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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-398

WAIT RADIO,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT BRIEF FOR CARTER PUBLICATIONS, INC. MIDWEST RADIO-TELEVISION, INC. AND CLEAR CHANNEL BROADCASTING SERVICE IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-14a) is reported at 459 F.2d 1203 (1972). The opinions of the Federal Communications Commission (Pet. App. 16a-37a) are reported at 22 F.C.C. 2d 934 (1970) and on reconsideration, 25 F.C.C. 2d 1016 (1970).

JURISDICTION

The jurisdiction of this Court is adequately set forth in the petition for a writ of certiorari.

QUESTION PRESENTED

The question presented is properly set forth in the brief for the Federal Communications Commission in opposition.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The constitutional and regulatory provisions involved are properly set forth in the petition for a writ of certiorari. The relevant rules of the Federal Communications Commission are appended to the brief for the Federal Communications Commission in opposition.

STATEMENT OF THE CASE

Petitioner WAIT Radio operates an AM radio station licensed to broadcast during daytime hours in Chicago, Illinois, on the clear channel 820 khz, on which WBAP, Fort Worth Texas, is the only station authorized to operate at night.[1]

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[1] Clear channel stations have been authorized in response to the unique characteristics of nighttime broadcast emissions. Broadcast signals at all times travel along the earth's surface, diminishing in intensity with distance, and the effective range of a "groundwave" signal is the same at night as in the day. However, broadcast signals also travel upward into the atmosphere. During the day, the sun causes these "skywave" emissions to be absorbed and lost, but at night, they are reflected by layers of the upper atmosphere back towards the earth, where they can be received at great distances from the point of origin, provided no other signal interferes. Where such

(Footnote continued on next page)

In 1967, the station applied to the Federal Communications Commission for authorization to broadcast at night on 820 khz. Under its proposal, WAIT Radio would provide the City of Chicago with its 26th nighttime broadcast service. To do so, WAIT would deprive more than two million persons residing in a vast and relatively underserved area running from Kentucky to South Dakota of skywave service from WBAP (Pet., 2 pp. 9a and 11a).[2] In addition, there would be a loss of service from clear channel stations WCCO, Minneapolis, Minnesota, and WGY, Schenectady, New York, which operate on adjoining clear channels (Pet., app. pp. 9a and 12a).

Intervenors, Carter Publications, Inc., the licensee of station WBAP, Midwest Radio-Television, Inc., the licensee of station WCCO, and the Clear Channel Broadcasting

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(Footnote one continued from page two)

interference exists, no signal can be received on the frequency. Consequently, more stations can operate free of mutually destructive interference on the same frequency during the daytime than at night.

The Commission has determined that the unique characteristics of nighttime broadcast emissions provide a means of ensuring some service to remote underserved areas and has reserved twelve frequencies, including 820 khz, for exclusive nighttime use by one clear channel station on each frequency. *See Report and Order on Clear Channel Broadcasting in the Standard Broadcast Band,* 31 FCC 565 (1961), reconsideration denied, 24 RR 1595 (1962), aff'd sub nom., *The Goodwill Stations, Inc. v. FCC,* 117 U.S. App. D.C. 64, 325 F.2d 637 (1963). As a result, WAIT and the other stations authorized to operate on 820 khz are required to cease operating at night.

[2] WAIT Radio is correct (Petition, p. 3) that skywave signals, because they are subject to atmospheric conditions, are less reliable than groundwave signals. However, in the area in which the WAIT nighttime signal would interfere with WBAP, the WBAP signal is of listenable quality. See *AM Station Assignment Standards,* 2 Pike & Fischer RR 2d 1658, 1663 (1964).

Service, an organization representing clear channel broadcast stations throughout the country, all participated in the FCC's proceedings and urged rejection of the WAIT proposal.

The Commission initially dismissed the WAIT application as unacceptable for filing on the ground that it conflicted with the Commission's clear channel rules as well as the Commission's rule against new nighttime authorizations on *any* frequency which would not result in a new service to an area without existing service ("white area").[3]

WAIT Radio appealed to the United States District Court for the District of Columbia Circuit which without reaching the merits, reversed the Commission on the ground that the Commission had not given the WAIT proposal a "hard look". *WAIT Radio v. FCC,* 135 U.S. App. D.C. 317, 418 F.2d 1153 (1969) (Judge Danaher dissenting). Thereafter, the Commission permitted WAIT Radio to submit further evidence in support of its proposal and heard oral argument but again rejected the WAIT application as inconsistent with the Commission's broadcast allocation policies. 22 FCC 2d 934, reconsideration denied, 25 FCC 2d 1016 (1970). WAIT Radio again appealed to the United States Court of Appeals for the District of Columbia, which this time affirmed the Commission's determination. *WAIT Radio v. FCC,* 459 F.2d 1203 (1972).

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[3] The latter rule, 47 CFR 73.24(b)(3), was adopted after the Commission determined that the AM spectrum was already oversaturated. The rule was designed to freeze further nighttime authorization except where the new authorization would provide a first AM service to a substantial area or population. *AM Station Assignment Standards, supra.*

ARGUMENT

WAIT claims that the FCC's denial of its request to operate at night must be equated with a denial of its First Amendment rights. According to WAIT, such denial presents a need for "higher standards of rationality" (Pet., p. 8) on the part of the Commission and thus a "higher standard of judicial review" of the Commission's decisions (Pet., p. 10).

Whenever the FCC denies a broadcast application or limits the facilities with which a station operates, someone is silenced, in whole or in part, and the public is denied the applicant's voice. Indeed, the FCC was created in response to the need for effective limitation of broadcast voices.[4] Justice White has aptly observed: "Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376 (1969). Under Section 307(b) of

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[4] See Senate Report No. 772, 69th Cong., where in considering the Radio Act of 1927 (the predecessor of the Communications Act of 1934) the Committee on Interstate Commerce explained:

> "If the channels of radio transmission were unlimited in number the importance of the regulatory body would be greatly lessened, but these channels are limited and restricted in number and the decision as to who shall be permitted to use them and on what terms and for what periods of time, together with the other questions connected with the situation, requires the exercise of a high order of discretion and the most careful application of the principles of equitable treatment to all the classes and interests affected. For these and other reasons your committee decided that all power to regulate radio communication should be centered in one independent body, a radio commission, granting it full and complete authority over the entire subject of radio."

the Communications Act of 1934, 47 U.S.C. 307(b), the Commission is charged with the responsibility to "make such distribution of licenses, frequencies, hours of operation and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

As shown in the FCC's Brief in Opposition, cases where the courts have upheld the Commission's denial of proposals for new broadcast service are legion.[5] Moreover, in order to permit WAIT to operate at night, the Commission would be silencing the reception of WBAP, WCCO, and WGY in the areas in which the WAIT signal would cause destructive interference.

Contrary to WAIT Radio's claim, however, the denial of a broadcast authorization based on engineering allocation policy does not present a Constitutional issue requiring a higher standard of judicial review.[6] Rather it merely

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[5] These cases also include numerous instances where the Commission was not faced with a choice between competing voices. See, e.g., *Henry v. FCC*, 302 F.2d 191 (C.A.D.C.), cert. denied, 371 U.S. 21 (1962).

[6] In *Brandywine-Main Line Radio, Inc. v. FCC* (C.A.D.C. Case No. 71-1181, decided September 25, 1972), the Court below applied a stricter standard of review in an FCC license case because of the presence of a First Amendment question. But that case is clearly distinguishable and presents no conflict with the Court's opinion in the instant case. In *Brandywine*, the Court upheld the FCC's denial of the renewal applications of two radio stations for violations of the Commission's "Fairness Doctrine" and personal attack rules, and for misrepresentations in the applicant's program proposals. The Court observed (slip. op. p. 71): "The most serious aspect of this case relates to the basic freedoms of speech and press which are essential guarantees of the First Amendment. This is the area of greatest concern to the Court. Any shortcomings in this area would

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involves a question whether the Commission has properly discharged its "public interest" responsibilities under the Communications Act. As this Court observed almost 20 years ago:

> "The right of free speech does not include . . . the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the 'public interest, convenience or necessity.' *Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.*" *National Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943) [emphasis added.]

More recently, the Court stated:

> "If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of

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(Footnote six continued from page six)

necessitate our reversing the decision of the Commission." In *Brandywine*, however, the FCC was faced with a licensee whose views were highly unpopular in the community and the Court was concerned with insuring that the FCC's decision was based on considerations other than its evaluation of those views. As Judge Wright stated in his concurring opinion (slip op. p. 93), it is "because the Commission's ruling has the possible effect of suppressing the ventilation of views with which there might be substantial disagreement, its action in denying renewal of the license requires particularly careful scrutiny . . . in such a case it is not enough simply to find that substantial evidence in the record, taken as a whole, supports the Commission and there was no abuse of discretion. In these circumstances, the Court itself should make its own evaluation of the evidence to insure that First Amendment freedoms of the licensee and the public are fully and fairly taken into account in the decision making process."

> them may have the same 'right' to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum." *Red Lion Broadcasting Co. v. FCC, supra,* 395 U.S. at 388-389.

Here, the commission has limited the WAIT "license so as not to overcrowd the spectrum." Of equal importance, the Commission's decision was necessary in order to preserve its basic allocation policy of providing service to underserved areas as well as its flexibility in meeting future allocation needs. And the Court below properly reviewed the Commission's decision under the long established judicial review criterion to determine if "the FCC exceeded its discretion in denying WAIT's application for authorization to broadcast during nighttime hours." *WAIT Radio v. FCC, supra,* 459 F.2d at 1204. The Court below concluded that it had no "warrant for saying that the Commission has failed on remand, to comply with our order that it take a 'hard look' at the matter and identify its reasoning" nor justification "for saying that the Commission's approach is either devoid of rationality, or is to be condemned as arbitrary and an abuse of discretion." 459 F.2d at 1210. No other standard of review is called for. See, *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474 (1950).

CONCLUSION

For the foregoing reasons, WAIT Radio's petition for a writ of certiorari should be denied.

Respectfully submitted,

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